Supreme Court, U. S.
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No. 80-661

In the

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

and

GRAPHIC ARTS INTERNATIONAL UNION,
LOCAL NO. 382, AFL-CIO-CLC,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

R. THEODORE CLARK, JR.
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QUESTION PRESENTED

Whether a Court of Appeals lacks jurisdiction to review a decision by the General Counsel of the NLRB to withdraw and dismiss a previously-issued complaint unilaterally and without any hearing pursuant to an informal settlement agreement opposed by the charging party and arrived at after *ex parte* post-complaint submission of evidence by the charged party.

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NATIONAL LABOR RELATIONS BOARD,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, George Banta Company, Inc., Banta Division, petitions for a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Fourth Circuit entered in this case on July 24, 1980.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 626 F.2d 354 and is reproduced herein as Appendix A. The Order of the National Labor Relations Board from which review was sought in the Court of Appeals was a letter dated March 27, 1979 from the General Counsel, reproduced herein as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on July 24, 1980. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

The following section of the Administrative Procedure Act (A.P.A.), 5 U.S.C. § 500, *et seq.*, is applicable and is appended verbatim: §706. Section 101.9 of the National Labor Relations Board's Statements of Procedure, 29 C.F.R. §101.9, is applicable to this case and is appended verbatim. Section 102.51 of the National Labor Relations Board's Rules and Regulations, Title 29, Chapter 1, Subpart C, 29 C.F.R. § 102.51, is also applicable to this case and is appended verbatim. The relevant statutory and regulatory provisions are set forth in the appendix attached as Appendices C and D respectively.

STATEMENT OF THE CASE

During a 1977 strike against the Company, approximately 72 employee/members of the Graphic Arts International Union ("Union") exercised their right under Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("Act"), to resign their Union membership and returned to work across Union picket lines. The Union responded to this action by demanding that each of the 72 employees, who had previously paid a Union initiation fee, pay a new initiation fee more than ten times the amount of the previously established fee as a condition of their continued employment.

On January 19, 1978, the Company filed unfair labor practice charges alleging that the Union's levying of the new initiation fee was discriminatorily motivated in retaliation for the exercise by the 72 employees of their Section 7 right to refrain from concerted activity, and that the fee was excessive.

On May 22, 1978, following investigation of the Company's charges and recommendation by the Division of Advice, Office of General Counsel, NLRB, that complaint be issued, the NLRB Regional Director issued a Consolidated Complaint alleging that the new initiation fees were both excessive and discriminatory, in violation of the Act. The Complaint was set for formal hearing and adjudication before an Administrative Law Judge.

On November 8, 1978, counsel for the General Counsel served the Company with an informal settlement agreement, already signed by the charged party Union, together with a Notice to Employees, and proposed thereby to provide "a complete remedy with respect to the allegations in the charges" contained in the pending Complaint.

The Company immediately filed its written objections to the proposed informal settlement agreement with the Regional Director, contending that the settlement remedied neither the excessive amount of the fee nor its discriminatory and retaliatory origins, by permitting the Union to continue to collect the new initiation fee (albeit subject to a maximum) from the 72 employees, where the very levying of the new fee had been deemed a discriminatory act by General Counsel in the pending Complaint. The Company specifically requested a full and complete evidentiary hearing on the continuing viability of the Complaint allegations prior to formal approval of the unilateral settlement agreement.

On November 16, 1978, the Regional Director formally notified the Company of his intention to approve the unilateral informal settlement agreement.

On November 21, 1978, the Company formally renewed its objections with the Regional Director, including its request for a hearing in the event its objections were rejected.

On November 29, 1978, the Regional Director formally rejected the Company's objections; he "concluded that the settlement agreement appropriately remedies the violations found and effectuates the purposes of the . . . Act", found the new initiation fee, as capped, "neither discriminatory nor excessive under all the circumstances", and accordingly "withdrew the Complaints in these matters".

On December 8, 1978, the Company filed its appeal with the NLRB General Counsel from the Regional Director's approval of the informal settlement agreement and withdrawal of Complaints; the Company again requested an evidentiary hearing on the continued viability

of the Complaint allegations as to the excessive and discriminatory nature of the new initiation fee.

On March 27, 1979, the General Counsel denied the Company's appeal in part, holding that "the evidence was deemed insufficient" to establish that the Union's levying of the new initiation fee was discriminatorily motivated. This was the first indication the Company had received that purported evidentiary deficiencies had led to settlement and withdrawal of the pending Complaints.

On May 9, 1979, the Company petitioned the Court of Appeals for review of the General Counsel's denial of its appeal on the discrimination issue. Six weeks thereafter, on June 22, 1979, the Regional Director notified the Company for the first time that his dismissals of the discrimination allegations in the Complaint occurred when, during "pretrial preparation" for hearing on the Complaint, "we received additional evidence" which led to the conclusion "that we could not meet our burden of establishing that the Respondent's imposition of its new initiation fees were discriminatorily motivated . . .". Subsequently, the NLRB informed the Court of Appeals in a formal pleading herein that the informal settlement agreement had been approved over charging party Company's objections for the following reason:

> "Prior to hearing on the complaint, further investigation by the Region disclosed significant weaknesses in the case against the Union regarding the discriminatory nature of the new initiation fee. Further interviews with the Board's witnesses revealed that their testimony would no longer support the allegations of discriminatory motivation behind the new initiation fee, and new evidence, supplied by the Union, showed that the initiation fees, when au-

thorized by the Union's membership, were not intended to apply to union members who had crossed-over during the strike."

Since the Regional Director's June 22, 1979 letter purported to be his actual formal dismissal of the discrimination charges, notwithstanding his formal letter of November 29, 1978 which had initially given rise to the Company's right to appeal, the Company, to protect its rights, again appealed to the General Counsel, who rejected the appeal on July 15, 1979 for the reasons given in the June 22, 1979 letter.

REASONS FOR GRANTING THE PETITION FOR WRIT OF CERTIORARI

THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF FIVE CIRCUIT COURTS OF APPEALS ON THE IDENTICAL ISSUE AND RAISES AN IMPORTANT QUESTION OF FEDERAL LABOR LAW DESERVING RESOLUTION BY THIS COURT.

The Court of Appeals herein held that it lacked jurisdiction to review the NLRB General Counsel's decision to withdraw the previously-issued complaint unilaterally and without any hearing pursuant to an informal settlement agreement opposed by charging party Company. The Court stated as its rationale that General Counsel's decision, under the circumstances, was fundamentally prosecutorial in nature, based essentially upon his determination that the available evidence, supplemented by further post-Complaint investigation of facts presented solely by the charged party Union, would not support prosecution of the discrimination allegations contained in the Complaint. The Court held it lacked jurisdiction to review this decision even though a complaint had already issued, since Section 3(d) of the Act, 29 U.S.C. § 153(d), provides that a prosecutorial decision of the General Counsel is not subject to review by the Board or a court.

The Court's decision conflicts directly with decisions of the First, Third, Fifth, Ninth, and District of Columbia Circuit Courts of Appeals holding that determinations by General Counsel to withdraw complaints pursuant to informal post-complaint settlement agreements, over charging party objections, are reviewable for abuse of discretion, and that charging parties have standing to challenge such determinations.

The decision by the Third Circuit in *Leeds & Northrup Company* v. *NLRB,* 357 F.2d 527 (3d Cir. 1966) most clearly exemplifies the conflict among the circuits on the issue of court jurisdiction to review the General Counsel's decision to withdraw a complaint pursuant to an informal settlement agreement. In that case, on facts strikingly similar to those considered herein (union efforts to fine and otherwise penalize employees for crossing picket lines and refusing to engage in strike activities), the court held as a threshold matter that it had jurisdiction to review the refusal to grant charging party employer an evidentiary hearing on its objections to an informal, post- complaint settlement agreement between the NLRB and the charged party union which resulted in withdrawal of the complaint against the union. *Id.* at 531-533. The court emphasized that the Regional Director has absolute discretion, as a matter of procedure in unfair labor practice matters, to enter into a formal or an informal settlement agreement with the charged party. *Id.* at 531. The court noted that, if a formal, post-complaint agreement is chosen, the resulting order is reviewable by the Board, pursuant to Section 101.9(c)(2), NLRB Statements of Procedure, 29 C.F.R. § 101.9(c)(2), and the Board's order approving such agreement is judicially reviewable and enforceable. However, if an informal, post-complaint settlement agreement is chosen, it is not reviewable by the Board and no Board order issues; final appeal is merely to the General Counsel, as in the instant case. Section 101.9(c)(3), NLRB Statements of Procedure, 29 C.F.R. § 101.9(c)(3). The *Leeds & Northrup* court held that the mere choice of procedural form of settlement by the Regional Director, unregulated by even minimal standards under the Act or NLRB Rules and Regulations, could not foreclose judicial review of the General Counsel's decision to settle and

withdraw a complaint over charging party's objections, particularly in view of the standing possessed by charging parties after a complaint has issued, citing *International Union, United Auto Workers of America* v. *Scofield,* 382 U.S. 205 (1965). *Leeds & Northrup Company* v. *NLRB, supra* at 532-533. The Third Circuit concluded, as follows, 357 F.2d at 533:

> "Clearly, once a complaint issues the statutory scheme contemplates Board action. Anything less, such as informal actions of its agents in dismissing such complaint over the objections of the charging party, is arbitrary and capricious. . . . [I]f an amicable adjustment of a labor dispute cannot be brought about through informal negotiations with the consent of all the parties, after the issuance of a complaint, then such informal proceedings must be formalized for Board action within the statutory scheme, thereby creating a record for judicial review."

See also Marine Engineers Beneficial Association No. 13 v. *NLRB,* 202 F.2d 546, 549-550 (3d Cir. 1953), *cert. denied,* 346 U.S. 819 (1953); *Terminal Freight Cooperative Association* v. *NLRB,* 447 F.2d 1099, 1101 (3d Cir. 1971), *rehearing denied,* 461 F.2d 777 (3d Cir. 1972).

Similarly, in *International Ladies' Garment Workers Union* (*ILGWU*) v. *NLRB,* 501 F.2d 823 (D.C. Cir. 1974), the D.C. Circuit, after observing that the "substantive elements of the formal and informal settlement are essentially identical," concluded that "after a complaint has issued and the administrative process initiated, certain actions which broadly conceived might be characterized as 'prosecutorial' assume essentially adjudicatory attributes." *Id.* at 831. As a result, that court rejected the NLRB's contention that it did not have jurisdiction to review the withdrawal of a complaint following an informal settlement agreement because the action of the General Coun-

sel was prosecutorial and, therefore, not subject to judicial review.

Particularly relevant to the instant case is the D.C. Circuit's recognition of the significant fact under the regulatory scheme that it is the General Counsel whose absolute unreviewable discretion determines whether the settlement is to be formal or informal in the first place, and that this necessitates judicial review of his post-complaint decisions:

> "It is arguable, of course, that the power of the General Counsel to choose the mode of settlement without minimal standards in either the Act or the Board's regulations and concomitantly delineate the jurisdictional parameters of the Courts of Appeals itself would be intrinsically arbitrary, except that it may be saved by the power of the courts to review both the choice and the ensuing result in order to guard against arbitrary and capricious action." *ILGWU* v. *NLRB, supra* at 830, n. 27.

It is precisely this protective power of judicial review, recognized by the Third and D.C. Circuits in their decisions, which the Fourth Circuit has denied the Company in the instant case.

The decision below treats the General Counsel's prosecutorial discretion as absolute, whether or not a complaint has issued, and considers the issuance of a complaint to be of no significance. This conclusion is also in direct conflict with the holdings in five circuits that the issuance of an unfair labor practice complaint marks the commencement of the adjudicatory phase of the administrative proceeding, during which the charging party possesses standing to be heard before its charges, now in complaint form, can be dismissed by the General Counsel, precisely so that a record may be created for judicial review of the rea-

sonableness of the General Counsel's exercise of his post-complaint discretion. *Leeds & Northrup Company* v. *NLRB, supra* at 535; *Marine Engineers Beneficial Association No. 13* v. *NLRB, supra* at 549-550; *ILGWU* v. *NLRB, supra* at 830-831.

In its decisions, the Third Circuit has preserved charging parties' standing to challenge informal post-complaint settlement agreements by requiring consent of all parties for effectuation of such settlements, and by affording charging parties an evidentiary hearing in which to offer support for the continuing viability of their charges before the complaint may be dismissed. *See Leeds & Northrup Company* v. *NLRB, supra* at 535-536.

The First, Fifth and Ninth Circuits have held that after the issuance of an unfair labor practice complaint and presentation of a post-complaint settlement agreement, to which the charging party objects, the charging party must be afforded (1) an evidentiary hearing on any material issue of disputed fact raised in its objections, and (2) a presentation on the record of reasons for the Board's acceptance of the settlement agreement notwithstanding the charging party's objections. *NLRB* v. *Oil, Chemical & Atomic Workers, International Union (OCAW)*, 476 F.2d 1031 (1st Cir. 1973); *Concrete Materials of Georgia, Inc.* v. *NLRB,* 440 F.2d 61 (5th Cir. 1971); *Poloron Products of Mississippi, Inc.* v. *NLRB,* 450 F.2d 793 (5th Cir. 1971); *NLRB* v. *International Brotherhood of Electrical Workers,* 445 F.2d 1015 (9th Cir. 1971). The D.C. Circuit applies the same two-part test, but in disjunctive form. *See Textile Workers Union* v. *NLRB,* 294 F.2d 738, 741 (D.C. Cir. 1961). Each court has made it clear that such safeguards are necessary, in part, to make meaningful the court review which they have held is available from Gen-

eral Counsel's determinations to settle and withdraw complaints over charging party objections. *See, e.g., NLRB* v. *OCAW, supra* at 1036.

The Fourth Circuit attempts to distinguish the instant case from *ILGWU* v. *NLRB, supra,* and *Leeds & Northrup Company* v. *NLRB, supra,* on the ground that the decision herein not to proceed with the discrimination charge was based upon an independent conclusion by the General Counsel, as prosecutor, that the available evidence was insufficient to prove the charge. 626 F.2d at 357. This rationale totally ignores the significance attributed by five other circuit courts to the standing of the charging party during the post-complaint adjudicatory phase of the unfair labor practice proceeding, as well as the basic purpose of the procedural protections guaranteed the charging party by those circuits after a complaint has issued.

Certainly General Counsel is not compelled to prosecute a case, even after complaint has issued, if his evidence, in his judgment, is too weak to support the allegations. But as five circuits have recognized, after a complaint has issued, General Counsel's discretion in this regard cannot be immune from judicial review and therefore absolute, and charging party has standing to challenge that exercise of discretion by testing the continuing viability of the factual underpinnings of the complaint.

The right to consent to a settlement agreement, or to have an evidentiary hearing on the continuing viability of the complaint or as to material issues of disputed fact, or to receive a record presentation of the reasons for approving settlement, are all designed expressly to protect charging party from the erosion, and ultimate withdrawal, of the complaint issued pursuant to its charges,

which may be caused by General Counsel's receipt of *ex parte* evidence from the charged party without notice or opportunity to rebut—precisely what occurred in the instant case. Indeed, the facts of the present case are far more compelling for judicial review and the right to charging party input into the settlement approval process than were the facts in *Leeds & Northrup Company* v. *NLRB, supra,* since here the Board's decision to withdraw the discrimination complaint and to approve the informal settlement agreement resulted directly from its post-complaint *ex parte* receipt of evidence from the charged party and from the alleged deterioration of witness testimony which had led to the issuance of Complaint. Since the settlement agreement resulted from General Counsel's receipt of post-complaint evidence from the charged party Union, the Company's objections thereto, which requested an opportunity to rebut the "new" evidence received *ex parte,* on their face raised material issues of disputed fact under the test applied by the First, Fifth and Ninth Circuits.

The exclusion of the Company from the post-complaint investigation process, and from obtaining judicial review thereof, was wholly inconsistent with constitutional principles of due process and equal protection and with the need to protect "those sensitive areas in the labor-management complex which the adjudicatory process provided by the Act was designed to reach." *Leeds & Northrup Company* v. *NLRB, supra* at 536.

CONCLUSION

The decision below conflicts directly with the decisions in five other circuits that a court of appeals has jurisdiction to review the General Counsel's decision to approve an informal, post-complaint settlement agreement and to withdraw a complaint over charging party's ob jections. Absent judicial review of such a decision under the circumstances of this case, substantial rights of both the Company and its employees under the Act are adversely affected. Judicial review is particularly appropriate where the General Counsel's decision to settle and withdraw complaint is taken on the basis of evidence received during an *ex parte* post-complaint investigation from the charged party, circumstances inevitably raising the possibility of abuse of discretion against which judicial review alone can offer protection for the charging party. Far from constituting a basis for distinguishing the instant case, these circumstances cry out for the application of the better rule upholding judicial review expounded by the courts of five other circuits. The fact that this issue has been addressed by virtually every circuit, frequently with results drastically different from the Fourth Circuit's decision herein, underscores that it is a recurring question, potentially arising in every complaint case where a settlement is imposed unilaterally by the Board, and therefore deserves the certainty of final resolution by this Court. Accordingly, it is respectfully requested that this Court grant this petition for a writ of certiorari, in order to resolve a conflict in the circuits and to answer an important question with respect to the

proper administration of the National Labor Relations Act.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

For The Fourth Circuit

No. 79-1283

GEORGE BANTA COMPANY, INC.,
BANTA DIVISION,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Petition for review of an order of the National Labor Relations Board.

Argued April 9, 1980 Decided July 24, 1980

Before WINTER and BUTZNER, Circuit Judges, and HOUCK*, District Judge.

Jeffrey L. Madoff (R. Theodore Clark, Jr., Michael J. Rybicki. Grant E. Morris, Seyfarth, Shaw, Fairweather & Geraldson on brief) for Petitioner; Christopher Katzenbach, NLRB (Norton J. Come, Acting General Counsel, John E. Higgins, Jr., Deputy General Counsel, Robert E. Allen, Acting Associate General Counsel, Elliott Moore, Deputy Associate General Counsel, Aileen Armstrong, Assistant General Counsel for Special Litigation on brief) for Respondent; Thomas D. Allison (Irving M. King, Cotton, Watt, Jones, King & Bowlus on brief for Intervenor.

* Hon. C. Weston Houck, District Judge, United States District Court for the District of South Carolina, sitting by designation.

WINTER, Circuit Judge:

George Banta Company, Inc. (the Company) petitions us to review and vacate an order of the Office of General Counsel, National Labor Relations Board, sustaining in part a decision of the Regional Director. The Regional Director had withdrawn and determined not to reissue a complaint that initiation fees to be charged persons seeking membership in Tri-Cities Local 383, Graphic Arts International Union, AFL-CIO (the Union) was a discriminatory levy on employees who had resigned membership of the Union during a strike and had returned to work across Union picket lines. Concluding that we lack jurisdiction, we dismiss the petition.

I.

The Company, which is engaged in the printing business, sustained a strike by its employees, who were members of the Union, from April 4, 1977 to October 10, 1977. During the course of the strike, approximately seventy-two employees resigned their Union membership and returned to work. When the strike was settled, the Union increased its initiation fees from the previous rates of $25 and $50 to a formula which resulted in charges of approximately $350 and $450. The new collective bargaining contract created a closed shop so that membership in the Union was a condition precedent to employment.

On January 19, 1978, the Company filed with the Board unfair labor practice charges against the Union. It alleged that the new initiation fee was both discriminatory, *i.e.*, it was designed to punish those employees who had resigned from the Union and worked during the strike, and excessive in the light of the prevailing initiation fees charged by similarly situated unions in the area. Following an investigation, the Regional Director issued a complaint charging that the initiation fees fixed by the Union were both excessive and discriminatory.

After the complaint was issued, settlement discussions between the Regional Office and the Union proved suc-

cessful, and they entered into an informal settlement. Under that accord, the Union agreed not to establish an initiation fee in excess of $250 and to make refund, with interest, to members who had paid a greater amount, and the Regional Director agreed to withdraw the charge that the fee was excessive. At about the same time, the Regional Director, who had satisfied himself from further investigation that he could not prove the charge of discrimination, concluded to dismiss the charge that the fee was discriminatory. The notice to the Company of the proposed settlement did not include specific notice that the Regional Director had concluded to dismiss the charge of discrimination. It spoke explicitly only of the reduction of the initiation fee. Arguably, however, from the reference in the letter to docket numbers, to the fact that the settlement would dispose of all charges, and to the proposed notice to employees that the Company would not establish initiation fees that restrained or coerced employees in the exercise of their rights, the Company should have been aware that the Regional Director intended to dismiss the discrimination charge as part of the settlement agreement.

The Company declined to accept this settlement. It took an administrative appeal to General Counsel in which it complained both that the fee was still excessive and that the settlement did not redress the discriminatory imposition of the new fee. General Counsel treated the appeal as being from the Regional Director's approval of an informal settlement and the Regional Director's refusal to reissue the charge that the fee was discriminatory. General Counsel approved the dismissal of the charge that the fee was discriminatory, but he concluded that the $250 maximum initiation fee permitted by the settlement was still excessive. Accordingly, the case was remanded for issuance of a new complaint that the fee was excessive and therefore in violation of § 8(b) (5) of the Act. The new complaint was issued and is presently pending.

After proceedings were instituted before us, General Counsel concluded that there were procedural irregularities, *i.e.*, lack of notice and an opportunity to appeal, with

respect to dismissal of the discrimination charge. Accordingly, he directed the Regional Director to act formally on the discrimination charge. The Regional Director then notified the Company by letter of June 22, 1979, that the discrimination charge was dismissed for lack of sufficient evidence of a discriminatory motive and that he was refusing to reissue a complaint based on that charge. He also gave the Company formal notice of its right to appeal. The Company exercised that right and on July 12, 1979, the Office of Appeals denied the Company's appeal for the reasons assigned by the Regional Director in his letter of June 22.

II.

The jurisdiction of the United States courts of appeals to review an order of the Board at the instance of a person aggrieved thereby is limited to "a final order of the Board granting or denying in whole or in part the relief sought . . . . ." 29 U.S.C. § 160(f). The phrase "final order of the Board" as used in § 160 (f) "refers solely to an order of the Board either dismissing a complaint in whole or in part or directing a remedy for the unfair labor practices found, that is, to an order entered as a culmination of the procedure described in Sections 10(b) and (c) of the Act, as amended [an order entered after the issuance of a complaint, after a hearing thereon and decision thereof on the merits]." Lincourt v. NLRB, 170 F.2d 306, 307 (1 Cir. 1948). The action sought to be reviewed here is the decision of the General Counsel to withdraw and not to prosecute further the charge in the complaint originally issued against the Union that the initiation fee was discriminatory. General Counsel, in arriving at this decision, was exercising the authority contained in 29 U.S.C. § 153(d), which vests in him "final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board . . . . ."

The legislative history of § 153(d) indicates that a prosecutorial decision of General Counsel is not subject to review by the Board or by a court, I NLRB, Legislative History of the Labor Management Relations Act, 1947 at 541, 883, 1538, 1622-23 (1948). As a consequence, courts have uniformly held that General Counsel's decision whether to issue an unfair labor practice complaint is not reviewable. NLRB v. Sears, Roebuck & Co., 421 U.S. 132, 138-39 (1975); Wellington Mill Division v. NLRB, 330 F.2d 579, 590-91 (4 Cir.), *cert. denied,* 379 U.S. 82 (1964). In the instant case, the complaint had originally issued; and after further investigation following its issuance, General Counsel concluded not to press it or reinstate it. The same rule is applicable, however, because the authority vested in General Counsel over the prosecution of complaints "must include the power to determine whether a complaint can be successfully prosecuted and, if he thinks not, to drop it." Local 282, Teamsters v. NLRB, 339 F.2d 795, 799 (2 Cir. 1964). In short, our jurisdiction to review General Counsel's prosecutorial decisions does not depend upon whether or not he has issued a complaint. It is the character of the decision which is critical. Where, as here, the decision is fundamentally prosecutorial — based essentially upon a determination that the available evidence will not support prosecution of the alleged violation—we hold that we lack jurisdiction to review.

We note the Company's heavy reliance on International Ladies Garment Workers Union v. NLRB, 501 F.2d 823 (D.C. Cir. 1974) and Leeds & Northup Co. v. NLRB, 357 F.2d 527 (3 Cir. 1966) to support a contrary result. But we think that both cases are inapposite. Both involved the withdrawal of charges pursuant to an informal settlement agreement which adjusted conflicting interests and both held that such post-complaint settlements are reviewable. In the instant case, despite the fact that the settlement agreement may be read to include dismissal of the discrimination charge as well as to settle the charge that the initiation fee was excessive, we think that the deci-

sion not to proceed with the discrimination charge was based essentially upon the independent conclusion that the available evidence was insufficient to prove the charge. It was not relinquishment of a cause of action having possible merit in an effort to achieve other objectives; it was recognition that a cause of action could not be proved. As such, it was an unreviewable prosecutorial decision.

DISMISSED.

APPENDIX B

NATIONAL LABOR RELATIONS BOARD

Office Of The General Counsel
Washington, D.C. 20570
March 27, 1979
Re: Tri-Cities Local 382, Graphic Arts International Union, AFL-CIO (Banta Division of George Banta Company, Inc.)
Case No. 30-CB-1256-1
30-CB-1256-2

R. Theodore Clark, Jr., Esquire
Seyfarth, Shaw, Fairweather and Geraldson
55 East Monroe Street
Chicago, Illinois 60603

Dear Mr. Clark:

Your appeal from the Regional Director's approval of an informal settlement agreement and refusal to re-issue complaint in the above matter has been duly considered. The appeal is denied in part and sustained in part. The evidence was deemed insufficient to establish that the Union violated Section 8(b)(1)(A) and/or (2) of the Act, as alleged. However, it was concluded that the settlement agreement obtained in this case, and particularly that portion providing for a $250 maximum (or "cap") on initiation fees to be charged members of Local 382, did not adequately remedy the Section 8(b)(5) allegations as to which the Regional Director found merit. Accordingly, the case was remanded to the Regional Director for further proceedings, including, if necessary, re-issuance of an appropriate 8(b)(5) complaint, absent

adequate settlement. All further inquiries should be addressed to the Regional Director.

Very truly yours,
John S. Irving
General Counsel
By /s/ Mary M. Shanklin
Mary M. Shanklin
Acting Director
Office of Appeals

Re: Case Nos. 30-CB-1256-1
30-CB-1256-2

cc: Director, Region 30

Tri-Cities Local 382, GAIU, AFL-CIO, Attn: Mr. Robert Miller, President, 52 Racine Street, Menasha, Wisconsin 54952

Cotton, Watt, Jones, King and Bowlus, Attn: Thomas Allison, Esquire, One IBM Plaza, Suite 4750, 330 North Wabash Avenue, Chicago, Illinois 60611

Banta Division of George Banta Company, Inc., Attn: Mr. John Hue, Director of Industrial Relations, Curtis Reed Plaza, Menasha, Wisconsin 54952

APPENDIX C

Relevant portions of the Administrative Procedure Act, 5 U.S.C. § 500 et seq.

Sec. 706. To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfullly withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

APPENDIX D

Relevant portions of National Labor Relations Board Rules and Regulations and Statements of Procedure.

NATIONAL LABOR RELATIONS BOARD

Rules and Regulations
and
Statements of Procedure
Series 8, as Amended

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Sec. 102.51 *Settlement or adjustment of issues.*—At any stage of a proceeding prior to hearing, where time, the nature of the proceedings, and the public interest permit, all interested parties shall have opportunity to submit to the regional director, with whom the charge was filed, for consideration, facts, arguments, offers of settlement, or proposals of adjustment.

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Sec. 101.9 *Settlement after issuance of complaint.*—(a) Even though formal proceedings have begun, the parties again have full opportunity at every stage to dispose of the case by amicable adjustment and in compliance with the law. Thus, after the complaint has been issued and a hearing scheduled or even begun, the attorney in charge of the case and the regional director afford all parties every opportunity for the submission and consideration of facts, argument, offers of settlement, or proposals of adjustment, except where time, the nature of the proceeding, and the public interest do not permit.

(b)(1) After the issuance of a complaint, the agency favors a formal settlement agreement, which is subject to the approval of the Board in Washington, D. C. In

such an agreement, the parties agree to waive their right to hearing and agree further that the Board may issue an order requiring the respondent to take action appropriate to the terms of the settlement. Ordinarily the formal settlement agreement also contains the respondent's consent to the Board's application for the entry of a decree by the appropriate circuit court of appeals enforcing the Board's order.

(2) In some cases, however, the regional director, pursuant to his authority to withdraw the complaint before the hearing (section 102.18), may conclude that an informal settlement agreement of the type described in section 101.7 is appropriate. Such agreement is not subject to approval by the Board and does not provide for a Board order. It provides for the withdrawal of the complaint.

(c)(1) If after issuance of complaint but before opening of the hearing, the charging party will not join in a settlement tentatively agreed upon by the regional director, the respondent, and any other parties whose consent may be required, the regional director serves a copy of the proposed settlement agreement on the charging party with a brief written statement of the reasons for proposing its approval. Within 5 days after service of these documents, the charging party may file with the regional director a written statement of any objections to the proposed settlement. Such objections will be considered by the regional director in determining whether to approve the proposed settlement. If the settlement is approved by the regional director notwithstanding the objections, the charging party is so informed and provided a brief written statement of the reasons for the approval.

(2) If the settlement agreement approved by the regional director is a formal one, providing for the entry of a Board order, the settlement agreement together with the charging party's objections and the regional director's written statements, are submitted to Washington, D. C., where they are reviewed by the general counsel. If the general counsel decides to approve the settlement agreement, he shall so inform the charging party and

submit the agreement and accompanying documents to the Board, upon whose approval the settlement is contingent. Within 7 days after service of notice of submission of the settlement agreement to the Board, the charging party may file with the Board in Washington, D. C., a further statement in support of his objections to the settlement agreement.

(3) If the settlement agreement approved by the regional director is an informal one, providing for the withdrawal of the complaint, the charging party may appeal the regional director's action to the general counsel, as provided in section 102.19 of the rules and regulations.

(d)(1) If the settlement occurs after the opening of the hearing and before issuance of the administrative law judge's decision and there is an all-party informal settlement, the request for withdrawal of the complaint must be submitted to the administrative law judge for his approval. If the all-party settlement is a formal one, final approval must come from the Board. If any party will not join in the settlement agreed to by the other parties, the administrative law judge will give such party an opportunity to state on the record or in writing its reasons for opposing the settlement.

(2) If the administrative law judge decides to accept or reject the proposed settlement, any party aggrieved by such ruling may ask for leave to appeal to the Board as provided in section 102.26.

(e)(1) In the event the respondent fails to comply with the terms of a settlement stipulation, upon which a Board order and court decree are based, the Board may petition the court to adjudge the respondent in contempt. If the respondent refuses to comply with the terms of a stipulation settlement providing solely for the entry of a Board order, the Board may petition the court for enforcement of its order, pursuant to section 10 of the National Labor Relations Act.

(2) In the event the respondent fails to comply with the terms of an informal settlement agreement, the regional director may set the agreement aside and institute further proceedings.